Shotland v Vukotic et al 04-55837

BYBEE, Circuit Judge, dissenting:

I must respectfully part company with the majority.

First, I believe that we should have granted the appellants' motion for judicial notice. The advisory committee's note to Rule 201 of the Federal Rules of Evidence, which governs judicial notice, distinguishes between "legislative" facts and "adjudicative" facts. *See* FED. R. EVID. 201 advisory committee's note. Adjudicative facts are defined as "simply the facts of the particular case," while legislative facts "are those which have relevance to legal reasoning and the lawmaking process, . . . [such as a] ruling by a judge or court . . . ." *Id.* The committee notes state that the court's "access to legislative facts" is "unrestricted," and that the parties "control no part of the process." *Id.* (quoting Edward M. Morgan, *Judicial Notice*, 57 HARV. L. REV. 269, 270-71 (1944)).

To resolve this case, the state court decision need not be considered for its "adjudicative" value—i.e., as evidence that the search in this case complied with the Fourth Amendment. Instead, we need only consider it as proof of the "legislative" fact that a reasonable jurist, i.e., the state court judge, concluded that the search was constitutional. Thus, while I join the majority in condemning the defendants' counsel for their failure to introduce evidence of the state court decision in the district court, I still believe that it is proper for us to take judicial

notice of the state court proceedings for the purpose of determining whether the defendants were entitled to qualified immunity.[1]

Yet even without considering the state court's decision, I would still reverse the district court and hold that the officers are entitled to qualified immunity. As the district court recognized in its thorough and considered opinion, the case with the most similar facts to those presented here is *United States v. Kunkler*, 679 F.2d 187, 192 (9th Cir. 1982). In that case, however, we *upheld* the search as constitutional under the Fourth Amendment. The facts of this case differ from those of *Kunkler*, and the district court may well have been correct in concluding that the search was unconstitutional. Nonetheless, I do not believe that the facts of *Kunkler* are sufficiently different that the officers here should reasonably have known that their conduct was unlawful.

The officers in this case were clearly operating close to the boundaries of the Fourth Amendment, and two reasonable judges could—and did—thoughtfully consider all of the evidence and reach different conclusions. But the very fact that

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[1] I reach this conclusion even though the defendants' lawyers negligently failed to include the transcript of the first state court hearing. Under my view of Rule 201, the fact that the parties did not bring the first hearing to our attention is of no importance. Additionally, the state court judge's ruling contained a discussion of the evidence on which the ruling was based. In my opinion, this discussion was sufficiently detailed and consistent with the evidence presented before the district court that it established what evidence was introduced with sufficient certainty for us to take note of the adjudication.

this question could reasonably have been resolved in either of these two ways means that, almost by definition, "it would [not] be clear to a reasonable officer that his conduct was unlawful," and the defendants are therefore entitled to qualified immunity. *See Saucier v. Katz*, 533 U.S. 194, 201 (2001) (citing *Wilson v. Layne*, 526 U.S. 603, 615 (1999)). I would reverse the district court.